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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 262.

THE GLOBE MUTUAL LIFE INSURANCE COMPANY, OF NEW YORK, PLAINTIFF IN ERROR,

vs.

MARCUS A. WOLFF, EXECUTOR OF ELIZA GARBER, DECEASED, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

ASSIGNMENT OF ERRORS.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

NOBLE & ORRICK,
Counsel.

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OF NEW YORK,
Plaintiff in Error,

vs.

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Deceased,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF SAID UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

The substantial record in this cause is brief and interesting, and the questions of law here to be determined obvious and pointed.

Eliza Garber, by her petition (set forth on page 3 of the printed record, which is the record we shall refer to in citing pages, &c.) sued the Insurance Company on an ordinary policy of life insurance, dated November 5, 1869, whereby the company for a premium of $134.35 to be paid it annually on November 1, assured the life of Charles H. Garber for the sole use of the plaintiff, in the amount of $5,000, for the the term of his natural life, commencing November 1,

1869. She alleged she had paid the premiums due on November 1, 1870, 1871 and 1872, and that the assured, Charles H. Garber, died November 11, 1872; that proof and notice of loss were made, more than 60 days had elapsed, and the company having failed to pay, she asked judgment for $5,000 and interest from February 1, 1873, and costs.

The suit was begun in the State Court, and was removed by the Company to the United States Court, where the Company put in its answer, (found on pages 7 and 8 of the record,) making defense on two distinct grounds.

1st. The express condition of the policy sued on, that if the several premiums should not be paid on or before the days mentioned for the payment thereof, the Company should not be liable, and the policy should cease and determine; and the agents of the Company were not authorized to make, alter or discharge contracts, or waive forfeitures; and that the annual premium due November 1, 1872, was not paid on or before that day, and the policy by its terms then ceased and determined; and that when said assured died the policy was not in force.

2d. The express condition, that if the person whose life was thereby insured, should, between the first of July and the first of November, reside in the parts of the United States which lie south of the 33d degree of north latitude, excepting California, *without the consent of the Company previously given in writing*, then said policy should be null and void; and that agents of the Company were not authorized to make, alter and discharge contracts or waive forfeitures; and that the insured, Charles H. Garber, between July 1st and November 1st, 1872, did *without the consent of the Company previously given in writing*, reside in that part of the United States which lies south of the 33d degree of north latitude, other than California, that is to say, at New Orleans, Louisiana, whereby the policy, before the assured's death, became null and void.

The plaintiff replied to this (pages 8 and 9):

1st. Admitting the premium for 1872 was not paid until after November 1, 1872, but alleging when it was paid the company delivered a receipt therefor duly signed by the Secretary; and that those delivering the receipts were authorized to do so at the time; and that the company by its course of dealing with its agents and the assured, and the plaintiff, prior to such payment, had authorized the premium to be paid and its agents to receive the same after it was due, and the assured and plaintiff to believe it would be so received; and that by receiving premiums on the policy for previous years after they were payable under terms of the policy, had waived any right to strict compliance with terms of policy as to payment of premiums; and that the premium for 1872 was received by agents and accepted by the company with full knowledge that it had been paid after November 1st; and also that said agents were authorized to waive forfeitures.

2d. The reply *admits* the assured, Charles H. Garber did *between Juty* 1 *and November* 1, 1872, *reside South of the 33d degree of North latitude, in said New Orleans;* but alleges that the *defendant* (company) well knew that he did reside during the said period of the year, south of said 33d degree, *when it issued* said policy to said Garber; and with full knowledge of *such* fact received not only the premiums on said policy for previous years, but also said premium of Nov. 1, 1872; and that said facts were well known to the agents of said defendant, who collected said premiums and who were authorized to waive forfeitures, both expressly and by reason of the course of dealing between defendant and its said agents; and defendant had so acted towards said Charles H. Garber and plaintiff as to lead and induce them to believe that said agents had power to waive forfeitures.

The reply further states that *when* the assured *died*, he was authorized by said policy to reside south of said 33d degree. And that his death was in no wise caused, occa-

sioned, promoted or brought about by reason of his having resided at any time south, as aforesaid, in the year stated, or any previous year.

On page 38 of the record, 5th line from the bottom, it is admitted and stated, "It is admitted practice that no further *pleading* is allowed after reply."

ASSIGNMENT OF ERRORS.

Such being the issues to be tried upon the whole record here presented, the plaintiff in error, the Life Insurance Company, complains and alleges the following errors to have been committed by the Court below:

1st. The Court erred in refusing to grant the instruction asked for at the close of the plaintiff's case in chief (p. 31), as follows: "The jury are instructed by the Court, that on the testimony and evidence introduced by the plaintiff herein, she is not entitled in law to recover in this action; and the jury will find for the defendant."

2d. The Court erred in its ruling upon a question of evidence, found on page 22, as follows: John Devine, an office boy and collector of the company, being examined as a witness for the plaintiff, to him was put the following question by plaintiff's attorneys:

"I will ask you in these cases where you were intrusted with the renewal receipts for premiums after they were due, whether you had any instructions from the Company or the agents of the Company, in reference to inquiring as to the health of the parties against whom the premiums were claimed?"

To which question defendant (Company) by its attorney objected, on the ground that the testimony to be adduced would be incompetent and irrelevant, and that said question

was irrelevant and incompetent. And the Court overruled the objection, and to the action of the Court the defendant excepted.

Witness answered: "Not any; as a general thing I had no inquiries to make in regard to the health of the parties I collected premiums from after they were due."

b. And also upon the question of evidence, (found on page 26). The witness, N. B. Weed, being on the stand, and on cross-examination, having just testified "When the premium for November 1, 1872, came into my hands November 11, 1872, I had no information that Mr. Garber was ill."

Defendant (Company) by its counsel put the following inquiry to witness:

"If you had had information, would you have received "the money!"

To which question the plaintiff by his counsel objected on the grounds of incompetency and irrelevancy, and the objection was sustained and the defendant excepted.

c. And also upon the question of evidence (found on page 38). The defendant rested the defence—Re-examination of Eliza Garber.

"And thereupon the plaintiff, by her counsel, offered herself again to be examined and the following question was asked her by her counsel:"

"In reference to this statement in this proof of loss or death that was made wherein you stated, or it was stated, that Mr. Garber had been ailing over a month,—I belive is the statement—what have you to say in regard to that?"

And to this re-examination and question the defendant, by its counsel, objected, because it was testimony in chief; was not responsive to or in rebuttal of any testimony for the defense; was to affect only a paper already offered and introduced by the plaintiff herself as sworn to, and she was estopped to deny or qualify it at this stage of the case, and was otherwise incompetent and irrelevant. The court overruled the objection, and to this ruling and action of the

court in this behalf the defendant, by its counsel, then and there excepted.

And the plaintiff thereupon stated as follows:

"The truth was, I was really astonished at the last trial when that proof stated Mr. Garber had been complaining a month, for it was impossible for me to hear him complain a month. He was perfectly well until the 6th day of November. It was the first day I heard him complain. I was at St. Louis attending the State Fair in 1872, which year the fair continued over a week. So I was not home even if he had complained, which he didn't. The proof was written out by a Notary, sent by the agent of the Globe in New Orleans, just a few days after Mr. Garber's death, and I was really in such a nervous state at that time I scarcely knew what I said. The signature there I believe is mine, but not the filling up of that proof of loss. I don't know whether Mr. Garber complained until the 6th day of November; even then he was attending to his business on that day. I don't remember making any such statement to the Notary; instead of being one month it ought to be one week, for I was absent at the fair, and was not home until a very short time previous to Mr. Garber's death.

3d. The court erred in refusing the first instruction asked by the defendant (found on page 39), as follows:

"1. The jury is instructed that the provision in the policy of insurance sued on, that if the person whose life was thereby insured should, between the first of July and the first of November, reside in those parts of the United States which lie south of the 33d degree of north latitude, excepting California, without the consent of the company (here defendant) previously given in writing, the policy should be null and void, amounts, in legal effect, to a warranty by the parties in whose favor said policy was issued that said Garber should not reside in such prohibited district during the prohibited months named, or any part thereof, without the

written permission specified. And it is admitted by the parties to this cause that said Garber did reside, during the months from July 1st to November 1st, 1872, within the prohibited district—that is to say, at New Orleans, Louisiana. If the jury find the written permission of the defendant had not been previously obtained for him so to reside there, the plaintiff cannot recover in this action, and the jury will find for the defendant."

Refused.

4th. The court erred in refusing each of the following instructions:

"2. An omission by the assured to make known to the insurer any fact material to the risk at the time of effecting the contract of insurance or renewing the same by payment of renewal premium after the same had become past due, or *by payment of renewal premium after any express condition had been broken by the assured and not waived*, which material fact was then, at time of effecting the contract or so renewing the same, within the knowledge of the assured, avoids the policy and no recovery can be had thereon. The jury is to determine the materiality of any such fact so omitted to be made known, but the jury are to deem any such fact material which they may find from the evidence would, if made known to the insurer, have affected his estimate of the character and degree of the risk."

"3. Where, under the previous instructions, it becomes the duty of the assured to communicate to the insurer any particular fact or facts material to the risk, such assured person cannot in law be allowed to say that he, or she, was ignorant of such material fact or facts, if by the exercise of ordinary perception and intelligence, under the circumstances, he, or she, would have learned and understood such fact or facts to then be existing."

"4. It is admitted in this cause that Mr. Garber, whose life was insured, had resided in New Orleans, Louisiana,

from July 1st, 1872, to November 1st, 1872, without the written permission of the company, and that this was contrary to the express conditions of the policy sued on. If, under the circumstances, the jury believe from the evidence that Mr. Garber became seriously ill of yellow fever at New Orleans early in November, 1872, and of this illness died in the forenoon of November 11, 1872, and that the plaintiff paid or caused to be paid the renewal premium to the defendant or its agent on the morning of November 11th, 1872, without communicating the fact of said illness of Mr. Garber at the time of such payment, then the jury is instructed that the admitted violations of the policy as to such residence in the prohibited district were not waived by defendant by reason of any such payment received, and the jury will find in this action for the defendant."

"5. It is admitted by the parties that Charles H. Garber resided at New Orleans, Louisiana, from July 1st, 1872, to November 1st, 1872, without the written permission of the defendant, and this was contrary to the express condition of the policy sued on, and the court instructs the jury that, before they can find any waiver by the defendant of this condition by reason of the receipt of the premium on November 11, 1872; if the jury believes from the evidence that said Garber was then ill of yellow fever, and of which he shortly thereafter died; the jury must further find that the fact of this illness of Garber was communicated to the defendant before or at the time of the payment of said premium."

Which instructions and propositions of law were refused by the court, and as the same were severally refused by the court the defendant by its counsel then and there excepted to the action of the court in that behalf.

5th. That the court erred in its charge to the jury (found on pages 40, 41, 42 and 43).

1st. In stating as an undisputed fact that Mr. Garber was taken sick in New Orleans about the 6th or 7th of Novem-

ber, 1872, when the fact was not only disputed, and the illness asserted by defendant to have begun much earlier, but the only legal testimony introduced was in support of defendant's assertion.

2d. In stating the following propositions as the law governing the case:

a. "If you (the jury) believe from the evidence that the officers of the Company, transacting all the business of the Company respecting this policy, knew that Mr. Garber had been and was residing in New Orleans from July to November, 1872, in violation of the conditions of the policy as to the place of residence, and received the premium on the 11th day of November, with such knowledge, and issued a renewal receipt, then this ground of defence fails. But if the company received this premium without knowledge that the policy had been violated in this respect, then this defence is made out, and the plaintiff cannot recover. So that under this instruction, the only thing for you to decide is whether this premium, which was paid on the 11th day of November, was received by the Company's agent with the knowledge on their part that the condition of the policy now relied upon as a defence had been broken."

b. If you (the jury) find from all the evidence that the Company, by its general course of dealing and by its particticular course of dealing with Mr. Garber, waived prompt payment of the premium, and led him to believe that he could have 30 days after the first of November to pay, then having received the premium within the 30 days, this ground of defence fails.

c. If, however, there was no waiver of prompt payment, then the payment on the 11th day of November would not be effectual to renew the policy, if Garber was then dangerously ill with yellow fever, and this fact was not disclosed to the Company's agents to whom the premium was offered.

To which several propositions announced as the law of the case, objections were severally taken by defendant

below, and overruled, and the actions of the Court in that behalf severally excepted to.

6th, That the Court erred in overruling motion for new trial (found on pages 13 and 14, and exceptions reserved page 43); and particularly wherein it asserts the errors of law hereinbefore mentioned, and wherein it asserts the verdict is against the evidence.

7th, The Court erred in overruling motion in arrest of judgment (found page 14 and 15, and exceptions preserved page 43); and particularly in overruling said motion wherein it asserts: 1. The reply does not state facts sufficient to constitute a confession or avoidance of, or other legal reply to, the answer of the defendant; 2. on the record any judgment rendered should be for the defendant.

STATEMENT OF FACTS AND BRIEF OF POINTS AND AUTHORITIES.

A sufficient statement of facts appears in the argument on the first assignment of error.

On the first point of error we rely upon our right to bring the full record here, down to the close of plaintiff's case in chief, and the instruction then asked by defendant, among other authorities, upon the case of Pleasants vs. Fant, 22 Wallace, p. 116 where it is held, that if the Court sees, that if a verdict were rendered for plaintiff, it ought to be set aside as unwarranted by testimony, such instruction, should be given in advance of the verdict.

That case is full authority for the course taken by the defendant in this cause in this particular; and leaves only the question: was it error to refuse this instruction?

Recurring for a moment to the chief ground in controversy, the question whether the defendant Company had waived the admitted forfeiture from residence in the prohibit-

ed district during the *prohibited time*, we draw attention to the following features of the contract in controversy:

1st. Occasional *visits* to the prohibited district during the time prohibited for *residence* were permitted by the terms of the policy itself. [Page of record 15, line 20], but

2d. *Residence* was there prohibited between July 1 and November 1, in each year; and

3d. That there happened in the present case to be a coincidence between the day in the year when residence in the prohibited district might commence, and the day when the annual premium became due; November 1st being the day in each case.

It therefore follows as a necessary result, that under the policy the assured had a perfect right not only to be south of the 33d degree of north latitude, but to reside there from November 1st to July 1st, in every year. And it is just as necessary a conclusion that knowledge of such residence during such *permitted* period, was not knowledge of a fact that either put the Company or its agents upon inquiry as to residence for the *prohibited* period, or from which knowledge of residence by assured in the prohibited period could be inferred or argued.

All evidence, therefore, that the Company or its agents knew the assured *resided*, even, in this southern territory during any other months than July, August, September, and October, tends in no degree to avoid the defence set up that the assured did reside there during the prohibited months in 1872, without permission in writing.

With this point in view, we now call attention to the testimony introduced by plaintiff in chief, for the purpose of showing that there is nothing in it tending to prove that the agents of the Company knew when the premium was paid, of the residence of the assured in the prohibited district from July 1, 1872, to November 1, 1872, sufficient to support a verdict: and that, therefore the instruction asked at close of plaintiff's case in chief, should have been granted.

1st. The policy, proves the residence of the assured in 1869, was St. Louis, St. Louis Co., Mo.

2d. The proof of loss, made of course after the loss, shows only a residence in New Orleans, but no previous knowledge on part of Company.

3d. Testimony of John Devine, p. 21, shows he was merely office boy and collector, and he says nothing as to Garber's residence.

4th. Edgar Warne (p. 22), says he paid the premium on November 11, at about 8 o'clock. In relation to the point under view he said: "I told the boy that Mr. Garber was *in* New Orleans."

(This was not in the prohibited period.)

5th. N. B. Weed (pp. 23, 24, 25 and 26), says on this point: he was cashier, p. 23, 16th line from bottom. "I did not know Mr. Garber had a residence anywhere at this time. (This referred to Dec. 14, 1871, and after, when he left note with Colby). I supposed he was in St. Louis part of the time. I did not know anything about his residence. I knew his place of business was New Orleans. I had been told so by Mr. Francis. I left his address (with Colby) at New Orleans. I wrote a letter to Mr. Garber at New Orleans and received no answer. I then wrote a letter to Mr. Gross, *April* 5, 1872. I did not ask Mr. Gross about Mr. Garber's residence; it was simply where he might be found. Of course I supposed he resided at the point where he was doing busines at *that time*.

(April '72, not prohibited.)

The witness goes on to state about mailing note about November 1, 1872, the date he does not fix, and after some expressions to which objection was made and which ought not to have been permitted, as is contended; Witness continues, p. 24, line 25. When I sent this notice dated November 1, 1872, I didn't know Mr. Garber had any residence in one place in New Orleans any more than he had in St. Louis or some point East, I knew he was a

traveling man, or had been. I did not know he was a married man, (line 11 from bottom). I could not say where Mr. Garber's residence was a year prior. This receipt (dated Nov. 3, 1871) I sent to New Orleans because I was told he was there. I don't know what was told me, but I knew he was doing business there at that time; that was all I knew about it; a permanent business; there had been two or three premiums collected from New Orleans. I directed the notice of November 1, 1872, to New Orleans because I supposed Garber was there. I had directed a letter to him at New Orleans the year previous. I knew during the pendency of this policy that Mr. Garber was an importer of marble; that he had business relations in New Orleans, and also that he had had with Mr. Gross and Daniel Francis & Co.'s. How much of the time he spent in New Orleans or St. Louis, I didn't know. I suppose his time was divided between those two points and some points East, just as business called.

(Gross and Francis & Co. were at St. Louis. p. 24. 12th line.)

On Cross-Examination. (p. 25, line 30.) The notice for the premiums due November 1, 1872, when it came to me from the home office, was addressed to Charles H. Garber, St. Louis, Mo., and the erasure of St. Louis was made by me and New Orleans inserted. These notices were addressed at the home office according to the residence shown on the application.

6th. The testimony of John H. Tracy shows that he was Cashier of a bank in St. Louis, that William A. Brawner (manager of defendant) left note for collection against Garber, dated November 1, 1870, which was collected. Brawner said Garber lived in New Orleans; that he had a great deal of trouble collecting of Mr. Garber; that he sometimes collected through Francis & Co., St. Louis.

(In regard to this, we wish to remark here that Gross (plaintiff's witness, p. 29) and Mrs. Garber (pp. 30 and 31)

show Garber did *not* reside in New Orleans in 1870; also that the note *dated* November, 1870, must have been presented after that, when Garber was rightly in the Southern territory under the policy; and that, being the first premium after delivery of the policy, Mr. Brauner could hardly have collected many premiums *previously*, in any way.)

7th. The receipts following on pp, 26 and 27 show nothing on this point of knowledge of residence.

8th. The letter of Weed to Gross, dated April 6, 1872, shows no knowledge—rather want of it—and is during the permitted period.

9th. The notice for premium on the 1st of November, 1872, has been fully explained by Weed above, and he denies knowledge of residence at the time (p. 29.)

9th. The letter of Weed to Garber, November 3, 1871, was addressed to New Orleans, when Garber not only might be there, but might reside there, and shows the note was first sent to Francis & Co.

10th. The note of December 14, 1871, by Garber, is dated *St. Louis*, was after the prohibited period, and shows no knowledge by agents.

11th. This note was signed by William Gross (p. 30). Gross says he then, *December* 14, 1871, informed an agent at St. Louis that Garber resided at New Orleans. It was when he gave Weed, the agent, the notes. He also says Garber resided in New Orleans from spring, 1871, to 11th November, 1872.

Garber, Gross says, *lived* in New Orleans for the last 15 years of his life, *more or less*. During the last two years of his life he was in New Orleans about two-thirds of the time. During the months of July, August, September, October, and November, 1871, he was part of the time at Lee, Massachusetts; part at Bridgeport, Conn.; part at Philadelphia, and part at St. Louis. In same months in 1872 he was part of the time in New Orleans and part at St. Louis.

12th. The testimony of Jno. P. Colby: Had a note for collection against Garber, from cashier of defendant. The information left at my office was Mr. Garber *lived* at New Orleans. Whether he told me at the time he *lived* there, whether the debtor *resided* there, I cannot tell. Mr. Weed was at my office at different times while the note was in process of collection, and the debtor was always spoken of as residing at New Orleans. The note was collected by us, at New Orleans, July 13, 1872.

Cross-examination: The most I mean by the term designating his place is to indicate where we were led to look for him. for the purposes of this collection. I have no knowledge whether he was there temporarily or permanently. He could be found there, is all I mean—might be found there for collecting that note. I cannot say I received any knowledge from Mr. Weed as to the permanence of Mr. Garber's stay in New Orleans.

On re-examination: Where Mr. Garber was, was spoken of to know where to send the note.

13th. The testimony of Mrs. Eliza Garber, plaintiff, shows she received notice of Nov. 1, 1872, on November 4th, 1872, at New Orleans, envelope addressed to Charles H. Garber, 565 Carondelet St., New Orleans. The No. on Carondelet St. was our private residence. Housekeeping at the time.

On cross-examination: Previous to taking out the policy I was residing in St. Louis. I really cannot say Mr. Garber was residing here [St. Louis]. I know nothing about his application to the company to get insured. I don't know where he lived. He was a gentleman who traveled a good deal. . . . Mr. Garber was in St. Louis 10 days in September, 1872.

The foreging is, we submit, a condensed, but fair statement of the items of evidence introduced by plaintiff in chief, to support the averment of the reply, that although

Garber resided south of 33 degrees, from July 1, to November 1, 1872, the defendant well knew Garber resided there during said period of the year, when it *issued the policy*, and with knowledge of such fact received not only the premiums on said policy for previous years, but also said premium for Nov. 1, 1872; and that said facts were well known to the agents of said defendant who collected said premiums.

We submit the whole testimony disproved *this averment in every particular*, instead of supporting it.

1st. It clearly appears that Garber was insured in the policy (1869), as resident of St. Louis, Mo.

2d. That he was not in fact resident at New Orleans until spring of 1871.

3d. That not a single witness testifies to any information conveyed to even an agent of the company, of residence by Garber as N. O. in the *prohibited period*.

4th. That Garber was as much, *in fact*, in St. Louis as in New Orleans.

5th. That Weed, the agent of the company, who is the plaintiff's witness, and not to be contradicted by her, repeatedly and emphatically denies he had knowledge at any time, and particularly when he sent the notice of Nov. 1, 1872, or received the premium paid Nov. 11, 1872, that Garber resided at New Orleans during the prohibited months, or at all.

The fact is completely established that Weed did not know of the forbidden residence. He swears, on behalf of the plaintiff below, he did not.

The statement by Brawner in 1870, is not a statement of residence, and, as we have shown, was before such residence in fact existed. The statement of Warne to Devine was a statement to an office boy under Weed, and was merely a statement that Garber was *in* New Orleans on November 11th.

6th. The company telegraphed back to return the premium as soon as it received notice of the fact, and before it received the money at home office.

Where then is there testimony sufficient to show such knowledge on the part of the agents as will make the receipt of the premium a waiver of the forfeiture arising from the forbidden residence? Where the contract is complete; the prohibition express; the violation admitted; and a waiver is based on knowledge, the burden of proof is not only on the party asserting the waiver, but he should, we submit, be held to clear and convincing proof of the knowledge.

Evans vs. U. S. Life Ins. Co., 6 Thompson and C. R. 331, s. c, Bigelow, Life and Accident Insurance Reports, vol. 5, p 335.

The court there says; "Such a case is taking of a risk, the terms of which are the subject of a new agreement arising out of the continued residence of the assured in a State or country prohibited by its policy, and in such case the doctrine of waiver, if applied at all, should be applied with great care."

But it must not be forgotten that the policy farther expressly provides that agents shall *not* waive forfeitures, and that to avoid this the plaintiff avers that such agents were authorized to waive such forfeitures *expressly*, and by reason of the course of dealing between defendant and its said agents, and defendant had so acted toward said Garber and plaintiff as to lead and induce them to believe that said agents had power to waive forfeitures. 1st. There is no testimony of any express authority to waive forfeitures. It is just the reverse. The policy forbids this very thing. 2d. There is no testimony whatever that defendant's agents had so acted toward the assured and plaintiff regarding this question of residence as to induce them to believe the agents had the power claimed. There was the policy, which is now

asserted, stating, exactly the reverse, and with the residence therein stated to the Company to be St. Louis. The assured was traveling between New Orleans and St. Louis, with the right to make occasional visits to New Orleans even in the months in which residence was prohibited. These matters, with the absolute denial of Weed, of knowledge, make as we submit, not a case for the plaintiff, but for the defendant, on the plaintiffs own showing. So that the plaintiff fails to prove knowledge by agents of the prohibited residence, and also fails to prove the agents had power to waive forfeiture. There is no substantial testimony to overcome the express prohibition of the policy.

But in the next place, we mention that the plaintiff's proof shows no waiver can legally be asserted against the Company, in this case, because it appears clearly thereby, that the assured was *in extremis*, at the time of the payment of the premium, November 11, 1872, and that this fact was not communicated to the Company or its agents. The premium was, pursuant to a telegram from New Orleans, paid by Warne to Devine, office boy, between 8½ and 9½ o'clock (p. 22), and Garber died same day about noon, 11½ (p. 31) of yellow fever (p. 18 bottom), He had been complaining for more than a month, and became seriously sick within the last five days preceding his death (p. 18, § 8). And these facts were not communicated to the Company or Company's agent, (Weed's testimony p. 26.)

These matters appeared before plaintiff closed her case in chief.

ERROR IN INSTRUCTIONS.

We will present in connection with the last point, supporting the first assignment of error, our points and authorities on the other assignments; the refusal of instructions offered by defendant, and granting those only, set forth, in charge to the jury. We maintain—

1st. That the testimony shows no such condition of case, as permitted the assured to make payment of the premium on Novemher 11th after it was due by the terms of the policy, *as a right*, secured by an implied previous promise or waiver of time of payment, even if there had been no other violation of the express terms of the policy than the mere failure to pay premiums.

2d. That in view of the admitted *additional* forfeiture of the policy, by the prohibited residence in New Orleans, there is nothing in the case or facts, or in the law governing such contracts as this policy, which authorized the assured, such forfeiture existing, to demand an acceptance of the premium offered on November 11th, 1872.

3d. That with both of these forfeitures existing, the transaction of November 11th, 1872, was in fact, and in law, the creation of a new agreement, and that therefore it was the duty of the assured to have communicated to the insurer the material fact, that Garber was then at the imminent point of death from yellow fever.

The Court throughout denied these propositions, and, as we submit, committed the marked error of maintaining, because, under some authorities, the insurer, who has given additional time to pay premiums, may be compelled to take a premium at any time within the extended period, without regard to the then state of the assured, that the assured may also by payment within the extended time, avoid a forfeiture *for any other breach* of the policy, without dis-

covering to the insurer the material change of condition in the assured.

We submit, reason and the authorities are to the contrary.

The great distinction is that where the time of payment of the premium is *extended* merely, the contract of insurance *continues*. It is a continuing contract, the express condition of payment not having been waived, but only the time thereof. So that in any case supposed when the loss happens, the contract, by *previous* agreement, is in force, payment of premium yet to be made.

But in the case of the residence in a prohibited district it is very different. In the first place, the permission is to precede the residence; then it must be in writing, and if the residence is without such permission, the contract at the first day of residence there become absolutely *void*. The operation of the residence is such, that the contract in question ceases to exist; and when subsequently a premium is offered on the policy, it is in fact offering to make a new contract. The question of extended payment does not enter into this question. It would have been the same if the premium had been offered and paid on the 1st of November, and Garber had that day been ill of yellow fever and had died soon thereafter. The assured on the 1st could have demanded acceptance of the premium, all other conditions having been performed, although all parties knew he was dying. But under such circumstances no such demand could have been made, if he had been residing in the prohibited district and the officers knew it. And so it was on the 11th of November, granting this extended time included that day, because of *previous* waiver of time, and that the assured could rightfully demand the acceptance of premium then, for that reason; it does not follow, nor is it true, that the same demand existed then notwithstanding the forfeiture from residence in prohibited district. Therefore, if the assured knew of material matters affecting the risk adversely to the insurer, when presenting the premium, after forfeiture for

the latter reason, it was his or her duty to make it known.

We cite some of the authorities on this point.

Ambiguous circumstances, or a consent by a broker or sub-agent having only ordinary authority, will not show waiver of punctual payment of premium.

Life In. Co. vs. Willets, 24 Mich., 268.
Morland vs. In. Co., 71 Pa. St., 393.

A policy of Insurance, forfeited by breach of a condition, cannot be revived by any act of waiver or estoppel, unless such act is done on full knowledge of the facts. Security In. Co. vs. Fay, 22 Mich., 467.

This Court has said in the Piedmont Insurance Co. case: 2 Otto R. 380.

"It cannot for a moment be contended, that while parties "are still in negotiation as to the terms of a contract, one "of them learning of a total change in the condition of the "subject matter of the contract of which the other is ignor- "ant, can at that moment accept terms which he has re- "fused before, and by so doing bind the party who had of- "fered those terms when the condition of affairs was wholly "different." p. 380.

* * * * * * *

"To hold that when he was *in extremis*, an hour or two "before he breathed his last, a friend could pay this small "sum to an agent of the Company, without the Company "having any idea of the condition of the dying man, "and thus secure an obligation to pay his administrator "$5,000 within 60 or 90 days, is to affirm that one party to "a negotiation can delay his assent to the terms of the con- "tract until the changes of fortune enable him to reap all "the benefits, and throw all the losses on the other side, "and then for the first time do what was necessary on his "part to make the contract obligatory."

"This case differs very widely from those cited, in which "delay in payment has been treated by the Court as

"waived. All such cases proceed on the ground that a valid "agreement as to the terms of the contract has been made. "In most of them one or two premiums have been paid, and "the delay in paying subsequently has been waived or ac- "counted for; or the amount of the first payment having "been agreed on, the agent or some one for the company "has so acted with the assured in the matter, as to show a "consent to delay."

Piedmont etc., Life Insurance Company vs. Ewing, 2d Otto R., 380-2.

The residence in the prohibited district rendered the policy void.

Evans vs. U. S. In. Co., 6 Thomp. & Co., (N. Y.,) 331; 3 Hun., 537.

By referring now to the instruction, or charge, of the Court to the jury, it will be perceived that while the Court admits that without a *previous* waiver as to time of payment, the mere acceptance of the premium on 11th of November, would not release from the forfeiture accrued from *non-payment* unless the condition of Garber was made known; and the Court is at great pains to point out to the jury the *previous* acts of the company from which such previous waiver might be found to exist, and then says if the company, by its general course of dealing and its particular course of dealing, waived *prompt payment* of the premium, and then received the premium, this ground of defence fails; but, if there was no such waiver (by general and particular course of dealing &c.) then the *payment* on Nov. 11th would not renew the policy, if Garber's condition was not disclosed.

Yet when the Court speaks of the *residence* in the prohibited district, it says not a word of *previous* waiver, but bases the whole waiver on the subsequent act of taking the premium, with knowledge of the previous *forfeiture* itself, and nothing more. Reflect for a moment, that the non-pay-

ment of premium on 1st Nov. was cause of forfeiture in one case; that residence at New Orleans was cause of forfeiture in the other case; that acceptance of the premium on the 11th was necessarily *with knowledge that it had not been paid on the 1st*; but the Court says this acceptance on the 11th, with this knowledge of this forfeiture would not release from the forfeiture for non-payment on the 1st, unless the jury find a previous waiver as to time; yet the Court turns round in regard to the residence at New Orleans and says, acceptance of the premium with knowledge of the forfeiture from this residence, releases from the forfeiture, without any *previous* permit or *previous* waiver, whatever.

Disclosure of Garber's condition was necessary, the Court says, to make payment of premium effectual on November 11th, without previous waiver were proved; but such disclosure was not necessary to make payment effectual to waive forfeiture from residence, although no previous permit had been directly or inferentially given.

In regard to residence, acceptance with knowledge is sufficient to release. In regard to payment, acceptance with knowledge is not sufficient, but there should have been a previous waiver. This is putting this case against every other we have seen. It is making a forfeiture from non-payment the most strict. The courts generally make it the least so. But this case errs as much the other way also. It makes the express provisions of the policy nugatory, and substitutes new covenants for those made by the parties themselves.

This Court will also perceive in this connection, that Garber's premiums were payable *in advance*. When the policy was taken out, November, 1869, one premium was paid, and one became due every year thereafter, on November 1st, to keep the policy alive the succeeding year. Garber's residence in New Orleans began in 1871, and he spent all the prohibited period of 1871 *away* from New Orleans. (See Gross' testimony, page 30.) Gross says, "during

"the months of July, August, September, October and "November of 1871, he (Garber) was part of the time at "Lee, Massachusetts; part at Bridgeport, Connecticut; "part at Philadelphia and part at St. Louis. In some "months of 1872 he was part of the time at New Orleans "and part at St. Louis."

He therefore first broke the covenant not to reside in New Orleans, in the summer of 1872. At all payments previous to November 1, 1872, there had been nothing to waive. So no previous waiver as to residence was expected, or did it exist. So the proposition recurs, that the only act tending to show waiver so-called, was the act of accepting the premium November 11, 1872, which was in fact, however, making a new agreement.

Suppose Garber had died in New Orleans, residing there in September, 1872, will it be maintained the policy could have been enforced? We assert there is no evidence tending to support such claim.

POWER OF AGENTS.

We now will present our views on the proposition, that the whole charge is erroneous in assuming and asserting that the agents might waive forfeitures by their course of dealing with assured and plaintiff, when the policy expressly provided to the contrary.

There can be no pretence that there was any express authority to agents to waive forfeitures, or that any permission was ever given, in any form, to assured to reside in New Orleans; and it is difficult to see how, then, with an express prohibition in the policy, the assured could have been led to suppose, by any course of dealing, the agents were waiving forfeitures, or could do so.

We present the language of a number of distinguished jurists presiding in the most honorable courts of this country and England, as the best presentation of the question here.

Chase vs. Hamilton Ins. Co., 20 *N. Y.*, 55.

The Court says: "the application is signed by the assured, and it is expressly stated therein that the Company shall not be bound by any act done, or statement made to, or by, any agent or other person, which is not contained in this application. This is the express agreement of the party. Upon what principle the Court is to set the same aside I am unable to presume. A party signing a paper in reference to an insurance contract is presumed to know its contents the same as though it related to any other subject. Parties are at liberty to incorporate any provisions in their contracts that they please, provided they do not violate the rules of law. There is no reason why a party contracting with another through an agent may not agree that anything done by, or known to, the agent shall not affect the said contract unless made known to the principal in writing. That is precisely this case, and unless insurance contracts are to be made exceptions to the rule, the plaintiff is bound by the statements in the application, whether he knew them or not, unless prevented by fraud imputable to the defendant from learning what they were. Carelessness of parties, so prevalent in entering into contracts of this description, cannot justify a departure from the settled rules of law. The plaintiff, if he knew the contents of the application, can not complain of being bound by its provisions. It is his contract. If he did not know, that is not the fault of the defendant. It had a right to presume that he did know, and to act upon that presumption."

* * * * * * *

"I am at a loss to discover how an estoppel is based upon the acts and declarations of an agent whose acts and declarations it is agreed shall not affect the party against whom the estoppel is claimed."

Jennings vs. The Chenango M. In. Co., 2 Denio 75.
Brown vs. Cattaraugus M. I. Co., 18 N. Y., 387.
Bliss on Life Ins., p. 486.

In Catoir vs. Am. L. Ins. & T. Co., 33 N. J., 487, the Court says: "To waive a forfeiture, it is not necessary that the forfeiture shall already have occurred. If the premium is not paid when due, the policy is void. The forfeiture results from the non-payment. If additional credit is legally given on the premium, that is *ipso facto* a waiver of the forfeiture. It is a waiver of the operation of the clause of the forfeiture in the policy. If the agent undertakes to give credit on the premium, he undertakes to waive forfeiture, and that this agent was restricted from doing when this policy was received by the plaintiff. At that time the company sought to protect itself from unauthorized acts of its agents, by virtually declaring in what respect their powers were limited, and giving the plaintiff full notice thereof in the policy. He is estopped by accepting the policy from setting up in this cause powers in the agent at that time in opposition to the limitation of the conditions . . . There is no evidence even from which it could legally be presumed that the company had any knowledge of the short delay in payment of some of the preceding premiums by the plaintiff, and if any presumption of such knowledge could exist, the effect is entirely destroyed by the words in the margin of the receipt of June 8, 1865, the last receipt of premium, that it is understood and agreed that unless the next shall be paid on or before the day it becomes due, at twelve o'clock (noon), the policy will be forfeited and void. . . . This want of authority in the agent to relieve from payment of the premium when due, either by writing or verbally, is a fatal defect in the plaintiff's claim."

Also—

Wall vs. Home Ins. Co., 8 Bosw. 597.

In Taylor vs. Brit. Com. L. Ins. Co., an unreported case referred to and followed in *Kaelges* vs. *Guardian Life Ins. Co.*, 2 Law. 480, William Wilson was the agent to re-

ceive premiums; he was instructed that if the premiums were not paid within 30 days after the same became due to return the receipt to the General Agent in New York. The policy provided that it should be void if the premiums were not paid within thirty days after the same became due. Taylor suffered default for over thirty days. About fifteen days after the policy became forfeited, the assured paid the premium to a clerk in the office of the agent Wilson. * * * The clerk in the office of the agent had generally received the premiums for his father, the agent. The Court held that William Wilson had no power to waive the forfeiture, or to bind the Company by receiving the money after default.

Tinley vs. Lycoming Ins. Co., 30 Pa. 314.

No one is held to have waived his rights until it is shown that he has done so with a knowledge of them or where it was his bounden duty to know them."

Forbes vs. Agawam M. F. I. Co., 9 Cush., 473.

"But waiving the question whether any agent or subordinate officer can waive an express stipulation in a contract already made and executed, * * * his mere knowledge of the making of the second policy could not amount to an assent on the part of the defendants." In this case the by-laws required a written assent by Secretary of Company."

Barrett vs. The Union M. F. I. Co., 7 Cush., 175.

Blake vs. Exchange Mutual Ins. Co., 12 Gray. 265

"If the plaintiff relied upon any exemption from the obligations of the policy or any modification of them by the agents or officers of the Company, or any addition, he must show such exemption, modification or addition by endorsement upon the policy."

(The policy required such endorsement.)

Hale vs. Mechanics' Mutual Life Ins. Co., 6 Gray, 173.

"But the difficulty in maintaining the plaintiff's position on this part of the case is that, not only that it attempts to substitute for the written agreement of the parties a verbal contract, but that there is an entire absence of authority on the part of the president to make such waiver or give such verbal assent. He was an agent with powers strictly limited and defined, and could not act so as to bind the defendants beyond the scope of his authority * * * * The whole extent and limit of the president's authority in this respect were set forth in the by-laws, and as the evidence shows them fully known to the assured."

In this case the President gave his verbal assent to additional insurance when the by-laws attached to the policy required the President's assent in writing. See also

Worcester Bank vs. *Hartford L. Ins. Co.*, 11 Cush., 265.

Lee vs. *Howard Fire Ins. Co.*, 3 Gray, 589 and 594.

Franklin F. Ins. Co. of Balt. vs. Chicago Ice Co., 36 Md., 119.

Abbott vs. *Gatch*, 13 Md., 329.

As remarked by the author in May on Insurance, p. 607, the elasticity of the doctrine of equitable estoppel has been put to the test of severest tension. But we have been unable to find a single case where, in the face of an express limitation upon the powers of an agent, incorporated in and made a part of the contract of insurance, it had been held that a waiver can be inferred from any act of such agent in opposition to the limited authority thus expressly defined. If an explicit povision of the contract can be thus abrogated and set at naught by an irresponsible agent of an Insurance Company, for protection against whom this very stipulation was made and thus brought to the knowledge of the assured, it is difficult to perceive what restraint can be imposed upon such agents, that will prevent them from

entirely destroying the original contract and substituting another and different one without the knowledge of their principals. Although they may have availed themselves of every precaution by notifying the assured of the express limitation upon the authority of such agents, and prescribing the only manner of modifying the contract, yet if an agent can, by an act clearly beyond the scope of his express authority, create a new and more onerous contract for his principal, then the contract of insurance will truly have become a species of outlaw without any recognized rules of construction, save that sufficient elasticity is to be imparted to its provisions to fix the liability of insurers under all circumstances.

Proof of Custom to receive premiums over-due is not admissible.

Busby vs. N. A. L. Ins. Co., M. S. S. decision C. of Appeals, Md., 40 Md., p. 572.

In Bouton vs. The Am. M. L. I. Co. 25 Conn., p. 554, the Court says, in speaking of the power of an agent to receive payment after premium is due: "We think that he was not empowered to receive any premium which was not paid according to the requirements of the policy, that is in advance. That instrument was his sole guide in regard to what he should do under it. The contract was to be made by the defendants and not by him, excepting in the capacity of their agent; he was not authorized to alter or vary it or depart in any respect from it, or dispense with the fulfillment of its conditions by the insured or discharge or revive it after it had by its terms ceased to be obligatory on his principal, by a waiver of compliance with its provisions or otherwise."

"Where local agent of a life insurance company, on re-
"ceiving 1st premium due on a policy, represented to the
"assured that the company were in the habit of giving 30

"days notice to its policy holders of the time when each "premium falls due, and promised that he would give such "notice, and the assured died two days after the 2d pre- "mium fell due, no such notice having been given to him, "and the proof failed to show that the agent had any au- "thority to make such an agreement, *held*, the beneficiary "could not recover on the policy."

Morey vs. N. Y. Life In. Co., 4 Biglow Life In. and Accident Reports, p. 158.

It is to be observed that these authorities go chiefly to the question of power to waive forfeiture from non-payment of premium, by subsequent acceptance thereof; but they are much stronger to support the proposition that the agent could not waive a forfeiture from an entirely independent cause, by mere acceptance of the premium. The possession of the money is in some degree an equivalent for the past forfeitures from non-payment, but it has no natural relation to a forfeiture from residence in a prohibited district, and is no equivalent as this case fully exhibits. The agent by this gross construction would be able to put the yellow fever among the risks of the Company, whether it chose to do business on that basis or not.

We are aware of the case of Viele vs. Germania In. Co. 26 Iowa R., 9, and the learned note thereto, printed in Withrow & Stiles' Iowa Digest, "Insurance," p. 622; but we think the cases opposed, 23 Peck, 418, 6 Cush. 342, 16 Ohio, 148, and others, the stronger, and we rest on them.

But even the Iowa cases and those in harmony with them do not go to the extent of holding an agent forbidden can yet waive forfeitures by acts, declarations and "dealings."

This closes our points in support of our first assignment, including also some of the points in support of other assignments.

The instruction asked at the close of the plaintiff's case should have been given.

THE EVIDENCE AS A WHOLE.

We have so far presented the case solely on the evidence of the plaintiff's case. But turning for a moment to the defense, we find the fact sworn to absolutely by Mr. Brawner (pp. 31 and 32) that he never knew Garber resided at New Orleans, or elsewhere than in St. Louis.

We have presented on the motion for a new trial one cause that the verdict is against the evidence. We have endeavored to show already that the plaintiff's case in no wise tended to support her claim. By Mr. Brawner's testimony, it is shown he is the only other agent at St. Louis (besides Mr. Weed), and Brawner swears he knew nothing of Garber's residence in the forbidden section as Weed had previously sworn. On the principle of the case of Pleasants vs. Fant above cited, we think a new trial should have been granted to defendant, beyond all doubt.

THE MOTION IN ARREST OF JUDGMENT.

We have already argued this, in arguing the instructions. The reply of the plaintiff to the answer is insufficient for the same reason that the judge's charge is erroneous. It attempts to substitute waiver by agent and by course of dealing, for the express permission in writing, and under a policy prohibiting agents to waive forfeitures.

THE QUESTIONS OF EVIDENCE.

These have all been argued in effect, by what we have already said, except the question regarding the Court's action in permitting the plaintiff to take the stand once more after defendant's case was closed, and impeach the proofs of loss, which had been introduced by herself, and had not been questioned by defendant.

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Respecting the nature and effect of these proofs of loss we refer to case of the Insurance Company vs. Newton, 22 Wallace R., pp. 35 and 36.

The Court says:

"They were presented to the Company in compliance with the condition of the policy requiring notice and proof of the death of the insured as preliminary to the payment of the insurance money. They were intended for the action of the Company, and upon their truth the Company had a right to rely. Unless corrected for mistake, the insured was bound by them. Good faith and fair dealing required that she should be held to representations deliberately made until it was shown that they were made under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained. There are many cases which hold that where a mistake has occurred in the preliminary proofs presented, and no corrected statement is furnished the insurers before trial, the insured will not be allowed on the trial to show that the facts were different from those stated."

In the present case such proofs, having ordinarily such effect, were, in addition, introduced by the plaintiff in evidence to sustain her cause, in chief.

The cause having been rested by the plaintiff; the motion for instruction, that plaintiff could not recover on the case as made, refused, and defendant having gone into its defence, in which the proofs of loss were not questioned, and closed; the plaintiff was allowed once more to take the stand, and recurring to the proofs of loss, to absolutely contradict them; and more than that, state that an agent of the defendant had made the false statement she had sworn to; and set forth her own distressed condition at the time, and otherwise, as is obvious from her statement, affect the sympathies and judgment of the jury.

We present this as a great departure from the rules of practice; a violation of the well understood rules of evidence,

and the result of which was, necessarily, to adversely and improperly affect the defendant before the jury.

We cannot but feel and say, that in this case, there was by the above action and otherwise shown, a strong bias against the defendant, leading, as we claim, to illegal and defiant action on the part of the plaintiff.

In conclusion, we sum up our case here as follows:

The assured, Charles H. Garber, commenced a residence, in violation of the provisions of the policy, at New Orleans, in the spring of 1871, but passed the prohibited months of July, August, September and October of that year outside the prohibited territory; that he paid his premium for 1871-2, so far as the Company was concerned, on December 14, 1871; the agent having taken the note of that date, and assumed the responsibility to the Company; in other words, reported the premium paid; that he resided in New Orleans from July 1 to November 1, 1872, contrary to the policy, and on which policy the agents were forbidden to waive forfeiture; that the assured had been complaining for a month before, and became ill of yellow fever on November 1, 1872, and died at 11½ noon of the 11th of November, 1872; that at 8½ of that day (November 11, 1872) the premium was paid to the agent at St. Louis, the home office, all the corporate officers being in the city of New York; that at the time of payment no information was given that Garber was *in extremis*; that as soon as his death was made known, and before the regular returns, in which the premium paid was to have been included, reached the home office, the chief officers of the Company telegraphed the agents at St. Louis to tender back the premium, which was done to Mr. Warne, who had paid thepremium, but he did not return the Company's receipt, and did not get the money; that the last notice of money coming due was sent for Garber at *St. Louis*, but the agent, on inquiry, sent it to New Orleans, where it was received on November 4, 1872, by plaintiff;

That on the trial in which this state of case was presented, the Court instructed the jury that the agents by a course of dealing could waive the time of paying premiums; and also, by acceptance of the premium paid Nov. 11, 1872, with knowledge that assured had resided at New Orleans the previous months of July, August, September and October, waive any forfeiture arising therefrom.

That this is not good law for the following reasons:

1st. There is no sufficient evidence to support a verdict that the officers did know on November 11th, 1672, that the assured was residing in the prohibited district.

2d. That mere knowledge, had it existed in the agents, with acceptance of the premium Nov. 11, 1872, was not a waiver.

a. Because the person's residence rendered the policy void.

b. The offer and acceptance of the premium on the 11th of Nov. was in effect making a new agreement.

c. That being so, the assured was bound to explain his critical condition.

d. That the charge of the Court concedes this last point as to effect of payment of premium, without previous waiver as to time; but refuses it as to effect of such payment without previous waiver or permission as to residence.

e. That the policy was void after first days' residence in New Orleans after July 1, 1872, and so remained, because the material fact that the assured was *in extremis*, was not made known, when the premium was paid on Nov. 11, 1872.

3d. That the policy prohibiting agents to waive forfeitures, the agents could not by their acts or declarations make such waiver,

a. Either of the forfeiture from non-payment of premiums,

b. Or, especially, of the forfeiture from residence in the prohibited district.

4th. That under the whole testimony and evidence, instead of knowledge being shown on part of agents or company that assured was residing in the prohibited district, exactly the contrary wns shown, and the verdict was unsupported by the evidence, or the weight of the evidence.

5th. That the reply was insufficient in law to avoid the defense of the answer; and on the record the judgment should have been for the defendant.

And 6th and lastly, it was an error most prejudical to defendant below, to allow the plaintiff to attack her own evidence and at the conclusion of the case take the stand once more and make the very important statements she did, and which defendant had then no opportunity to deny, and could not have anticipated.

It was not a fair trial; but in a case, affecting at this time in the history of litigation in the United States, in its results, as great an amount of property and as important principles as perhaps any other private litigation on foot, or in contemplation, the defendant below, a Life Insurance Company, has had its rights overthrown by errors in law, and unwarranted construction of its plain and explict contract; and been adjudged liable for a loss from yellow fever, in a district where it had been forbidden the assured to be, at the very time he began to grow ill from this well-known plague, and this on the slimmest kind of evidence, and, as we submit, the most illogical deductions therefrom.

NOBLE & ORRICK,
Counsel for Plff. in Error.

No. 262. OCTOBER TERM, 1876.

SUPREME COURT

OF THE UNITED STATES.

THE GLOBE MUTUAL LIFE INSURANCE COMPANY, *Plaintiff in Error.*

vs.

MARCUS A. WOLFF, EXECUTOR OF ELIZA GARBER.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

CLINE, JAMISON & DAY, With
MONTGOMERY BLAIR,
Attorneys.

ST. LOUIS:
CHANCY R. BARNS, PRINTER, 215 PINE STREET,
1877.

GLOBE MUTUAL LIFE INSURANCE COMPANY, *Plaintiff in Error.*	*In the Supreme Court of the United States.*
vs.	
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STATEMENT OF DEFENDANT IN ERROR.

This was a suit instituted by Eliza Garber, on a policy of insurance issued by the defendant on the life of her husband, Charles H. Garber, for her sole use.

The policy was dated November 5, 1869, and was made in consideration of the sum of $134.35 then paid to the Company; and of the annual payment of a like amount on or before the 1st day in November in every year during the continuance of the policy. The declaration averred that the premiums due on November 1st of each of the years 1870, 1871 and 1872 were paid to, and accepted by the Company; and that Charles H. Garber died on November 11, 1872, and that due proof and notice of death had been made, and given to the Company.

THE ANSWER of the Company set up two grounds of defense, as follows:

First. That by the terms of the policy sued on, it was provided that if the premiums should not be paid every year on or before November 1st, (unless otherwise agreed in writing), the policy should cease and determine, and the Company should not be liable for the sum assured or any part thereof, and that agents were not authorized to

discharge contracts or waive forfeitures; and the answer avers that the premium due on November 1, 1872, was not paid on or before that day, and that for that reason the policy was no longer in force.

Second, That it was provided by the policy, that if the insured should, between the 1st of July and the 1st of November, reside in those parts of the United States which lie south of the 33d degree of north latitude, without the consent of the company, previously given in writing, then said policy should be null and void; and the answer avers that Charles H. Garber had, between the 1st of July and the 1st of November, 1872, without the consent of the company previously given in writing, resided in New Orleans, being south of the 33d degree of north latitude, whereby the policy became void.

THE REPLY of plaintiff to the answer, averred as follows:

First. She admitted that the premium for the year 1872 was not paid until after November 1st, but averred that when it was paid to the defendant she received a receipt therefor, duly signed by the secretary of the company, and that the company by its course of dealing with its agents, and with Charles H. Garber and the plaintiff, prior to the payment of said premium, had authorized payments of premiums on the policy to be paid, and its agents to receive the same, after they were due; and by receiving premiums on the policy for previous years before they were due, had waived any rights it might otherwise have had to enforce a strict compliance with the terms of the policy, as to the time of payment of premiums; and that the agents who received the premiums were authorized to waive forfeitures.

Second. Plaintiff admits that the insured resided at New Orleans between July 1st and November 1st, 1872, but declares that the company, with knowledge of the

fact that he had resided there during that period in 1872, as well as in previous years, had received the premiums on the policy sued on, and so had waived any right to insist upon a forfeiture.

As bearing upon the issues made by the pleadings the following facts were adduced at the trial of the case:

AS TO AUTHORITY OF AGENTS OF THE COMPANY.

It was admitted at the trial (printed record, page 26) that William A. Brawner was the Manager of the Company at St. Louis and that N. B. Weed was its Cashier at the same place, and it appears by the evidence that both were appointed direct by the Company, and had a general control of the affairs of the Company within their department.

AS TO CUSTOM OF RECEIVING OVER-DUE PREMIUMS.

Mr. Weed, who was connected with the Company during the continuance of the policy in suit, testified (page 23) that while they tried to collect premiums when they were due as much as possible, yet if not so collected it was customary to allow 30 days for the payment of the same; if the payment was delayed beyond the 30 days a medical certificate might be required, and that this practice was known to the Company at the home office. Also, that if a party came to the office to pay a premium, or sent the same by letter within 30 days after it was due by terms of the policy, no requirement was made in regard to health. John Devine, a boy in the office, also testified (p. 21) as to a similar custom of the Company, at the St. Louis office, of collecting premiums after they were due without making any inquiries about the health of the party insured.

AS TO PAYMENT OF PREMIUMS ON POLICY SUED ON.

The premium due November 1, 1870, was paid (pp. 25 and 26) by a note dated November 1, 1870, which was subsequently collected of Mr. Garber, though the actual dates of the giving of the note and of the payment of the same are not disclosed by the record.

The premium due November 1, 1871, was paid (p. 29) by a note executed by Mr. Garber, dated December 14, 1871, due sixty days after its date, it thus appearing that the note was given one month and fourteen days after the premium was due, Previous to this, and on November 3d, 1871, being three days after the premium had become due by the terms of the policy, Weed, the Cashier, wrote a letter (p. 29) to Mr. Garber, directed to him in New Orleans, in which he informs him that if he will remit the balance due for his premium after deducting the dividend the renewal receipt would be mailed to him immediately; and then adds: "Please reply at once, as receipts can "be held only thirty days, and then at the risk of the as- "sured." There was no requirement (p. 23) as to the condition of Mr. Garber's health at the time the note dated December 14 was taken for the premium due on November 1st. The report made to the home office of the Company showed (p. 25) that this premium had been paid subsequent to December 1st, 1871.

The premium due on November 1st, 1872, was paid on November 11th, 1872. Prior to this time, a day or two before November 1st, (p. 24) Weed directed a notice to Mr. Garber at New Orleans, informing him (p. 28) that the premium on his policy would be due on November 1st. The notice was received by Garber (p. 30) on November 4th. On Sunday, November 10th, Mrs. Garber telegraphed to Mr. Warne, a friend at St. Louis, to pay the premium. On Monday morning Mr. Warne (p. 22) went to the office of the company, and as Mr. Weed, the

cashier, was not in, paid the premium to John Devine, an office boy, who (p. 21) was entrusted with renewal receipts and with the collection of the same. The premium was paid (p. 24) about 9 o'clock A. M., and was immediately turned over by the office boy to Mr. Weed, who received it and said it was all right. Garber died on the same day about half past eleven o'clock (p. 31). He was taken sick with the yellow fever about November 6th, 1872, up to which time he had been in good health. Dr. Brickell testified (p. 37) that he was called in as a consulting physician to see Mr. Garber on Sunday, Nov. 10th and he considered his condition desperate, but gave no such intimation to Mrs. Garber, and Mrs. Garber testified (p. 31) that she did not suppose her husband was dangerously ill on Sunday, the day the dispatch was sent. It was agreed at the trial (p. 31) that when Jno. Devine, the office boy, received the amount of the premium, on November 11th, from Warne, no statement was made as to the condition of Mr. Garber, nor were any questions asked by the company's agents concerning his health. Also that nothing in regard to the illness was communicated to any of the officers of the company or to Mr. Warne by Mrs. Garber's telegraphic dispatch. The premium received on November 11, was remitted to the home office. Brawner, the manager at St. Louis, wrote (p. 25 and 26) to the home office, announcing Garber's death and the circumstances of the payment, and a telegram was received in reply, to tender back the premium. According to that request Mr. Weed tendered the premium to Warne, on condition that the renewal receipt should be returned, which was refused.

AS SHOWING THAT THE CASHIER AND MANAGER OF THE COMPANY HAD KNOWLEDGE AT THE TIME THEY RECEIVED THE PREMIUMS THAT MR. GARBER HAD RESIDED IN NEW ORLEANS BETWEEN JULY 1ST AND NOVEMBER 1ST, THE FOLLOWING FACTS ARE DISCLOSED BY THE RECORD:

In the application for the policy, Garber was described as a resident of St. Louis. This application was written out by Brawner, the Manager, who solicited and procured the policy, and Mr. Brawner testified (p. 32) that Mr. Garber told him at the time that he had business sometimes in New Orleans and sometimes in St. Louis, though he says that Mr. Garber gave St. Louis as his residence.

The note which was given for the premium of 1870 was left by the Treasurer with the Central Savings Bank of St. Louis for collection. At that time (p. 26) Brawner informed Mr. Tracy, the cashier of the Bank, that Garber lived in New Orleans.

Mr. Gross testified (p. 29) that when he gave Weed, the agent, the note dated Dec. 14, 1871, for the premium which was due on the 1st of November previous, he informed Weed that Mr. Garber resided in New Orleans.

There was some delay in collecting the note dated Dec. 14, 1871, and it was left with Jno. P. Colby, Esq., an attorney-at-law at St. Louis, for collection. Mr. Colby testified (p. 30) that Mr. Weed was at his office several times while the note was in process of collection, and the debtor, Mr. Garber, was always spoken of as residing at New Orleans. The note was collected *at New Orleans, July* 13, 1872—thus showing that the note given for the premium due Nov. 1st, 1871, was collected of Mr. Garber in the July subsequent, with full knowledge that he was residing in New Orleans within the period interdicted by the policy.

It also appears (p. 23) that Weed had previously sent the note for collection to 187 Camp street, New Orleans, for collection. This was or had been (p. 30) Mr. Garber's place of residence; his place of business having always been at Chapoutoula street,—showing that Mr. Weed had received from some source explicit information as to Garber's place of residence;—and a letter of Weed's dated April 6, 1872, written to W. H. Gross [p. 28] indicates that he had previously made inquiry of Gross as to the place of Garber's residence; and Weed admitted [p. 23] that he knew Mr. Garber's place of business was at New Orleans, and "of course I supposed he resided at the point where he was doing business at that time."

The evidence further shows conclusively that at the time of the collection of the premium which was paid on November 11, 1872, the representatives of the company had knowledge that Garber had been residing at New Orleans during the period covered between July 1st, and November 1st, of that year. Of course they must be presumed to have still had knowledge of all the facts concerning his residence, which has already been shown to have been in their possession. It further appears from Weed's testimony [p. 24] that he sent the notice to Mr. Garber, relating to his premium due on November 1, 1872, a day or two before November 1st, and that he directed the notice in accordance with information he had previously received in reference to Mr. Garber's residence. This notice [p. 30] was addressed to "Charles H. Garber, 565 Carondelet St., New Orleans," which was the place of Garber's private ressdence at that time; his place of business being, as it always had been, on Chapoutoula street. It will then be observed that the notice was sent to Garber *before* November 1st, and within the period covered by the provision of the policy, which clearly indicates that the cashier and manager of the

company at St. Louis had knowledge that Mr. Garber was *then residing in New Orleans.*

The policy sued on was issued at the St. Louis office, where all the premiums were paid and where all the transactions of the Company respecting the policy were had.

Upon the foregoing issues and facts the law of the case was given to the jury, under instructions from Judge Dillon, whose charge is set forth at length in the record (p. 40).

AS TO RESIDENCE WITHIN THE PROHIBITED DISTRICT.

The Court declared that if the agents of the Company transacting all the business of the Company respecting this policy, knew when they received the premium on the 11th of November, that Mr. Garber had been and was residing in New Orleans from July to November, 1872, in violation of the conditions of the policy as to the place of residence, then that ground of defence failed; but that if the Company received the premium without such knowledge, the plaintiff could not recover.

AS TO THE DEFENSE ARISING OUT OF THE NON-PAYMENT OF THE PREMIUM ON THE FIRST DAY OF NOVEMBER, 1872.

The Court charged the jury, "If you find from all the evidence that the Company, by its general course of dealing and by its particular course of dealing with Mr. Garber, waived prompt payment of the premium, and led him to believe that he could have thirty days after the first of November to pay, and then having received the premium within the thirty days, that ground of defence fails. If, however, there was no such waiver of prompt payment, then the payment on the eleventh of November would not be effectual to renew the policy, if Garber was

then dangerously ill with yellow fever, and this fact was not disclosed to the Company's agents, to whom the premium was offered."

Under the above instructions the jury found a verdict for the plaintiff, being the second verdict given the plaintiff in the case. And the Company having continued the litigation beyond the lifetime of Mrs. Garber, the beneficiary, the suit has been renewed in the name of her executor.

BRIEF OF DEFENDANT IN ERROR.

The law of this case, as laid down in the instructions of the Court, is fully and uniformly sustained by the decisions:

I.

It is a settled doctrine that the receipt of a premium on a policy of insurance, with a knowledge of any breach of warranty or of any prior act which would forfeit the policy under its terms, ratifies the contract and revives and continues the policy; and the receipt of a renewal premium after it is due has the same effect in all respects as though it had been paid at the time it was due.

May on Insurance, § 502.
Bliss on Life Insurance (2d ed.), § 308.
Carpenter vs. Ins. Co., 2 Am. Lead. cases (5th ed. Hare & Wallace's Notes), p 906.
Viele vs. Germania Ins. Co., 26 Iowa, 1 (and cases there cited).
North Berwick Ins. Co. vs. Ins. Co., 52 Me., 336.
Bouton vs. Ins. Co., 25 Conn., 542.

II.

As all the transactions in reference to the policy sued on were had with the Manager and Cashier of the Company, it cannot be contended that their acts and knowledge of the facts were not binding upon the Company. But if they had been ordinary agents, with no authority from the Company except to collect the premiums, and with no power to waive any of the conditions of the policy, the Company would still have been bound by their

acts in receiving premiums with knowledge of the fact that there had been a forfeiture of the policy. Notice to the agent in such a case is notice to the principal, and the forfeiture is waived the same as though the principal had received the premium with knowledge of the same facts, even though the policy provides that agents have no authority to alter, contracts or waive forfeitures.

Insurance Company vs. Wilkinson, 13 Wallace, 222.

Miner vs. Phœnix Ins. Co., 27 Wisc., 693 (and cases cited).

Viele vs. Germania Ins. Co., 26 Iowa, 9 (and cases cited).

Peoria Ins. Co. vs. Hall, 12 Mich., 202.

Franklin vs. Ins. Co., 42 Mo., 456.

New York Central Ins. Co. vs. Ins. Co., 20 Barb, 469.

Hodsdon vs. Guardian Life Ins. Co., 97 Mass., 144.

May on Insurance, § 143.

Wing vs. Harvey, 27 Eng. Law and Eq., 140.

III.

A forfeiture of a policy by reason of residing within a prohibited territory may be waived, like any other ground of forfeiture, by a receipt of a premium by either the Company or its agent, with knowledge that there has been such ground of forfeiture.

Bevin vs. Conn. Mut. Life Ins. Co., 23 Conn., 244.

Walsh vs. Ins. Co., 30 Iowa, 133.

Wing vs. Harvey, 27 Eng. Law and Eq., 140.

IV.

Even if it be assumed that there is evidence in the case tending to show that Mrs. Garber, the beneficiary in the

policy sued on, knew that her husband was dangerously ill at the time the premium was paid on November 11th, 1872, still it was not incumbent upon her to make that fact known to the agents of the company who received the premium. The evidence is undisputed that there was a general practice at the St. Louis office, known to the officers of the home company, of receiving premiums of parties insured within the period of 30 days after they became due, and without requiring any statement of the condition of health of the insured.

In reference to the policy sued on it is also undisputed that Mr. Garber had been informed by the company in 1871, that renewal receipts were held for the payment of premiums for a period of 30 days; and it is also undisputed that the premium due November 1, 1871, was received by note on December 14th, and that it was known at the home office that this premium had been collected subsequent to December 1st. It is further apparent that the company also waived the prompt payment of the premium due on November 1st, 1872; for the notice respecting that premium was not mailed from St. Louis until one or two days prior to November 1st, did not reach New Orleans by course of mail until November 4th, and of course the agents who sent the notice could not have anticipated that the premium would be remitted in answer to the notice until some days *after* November 1st.

It is a well established principle that if an insurance company allows a latitude to a party in the payment of premiums after they are due by the terms of the policy; or so deals with a party as to lead him to believe that the clause of forfeiture will not be insisted on, in case of dereliction of payment on the day stipulated in the policy, the company is precluded from declaring a forfeiture of the policy, by reason of the non-payment of the premium at the time stipulated in the policy. And in such

case the company is bound to accept the premium and continue the policy in force if tendered at any time within the period in which the party has been made to believe that it would be received. The customary dealing by a company with its policy holders may be shown to prove a waiver of its right to enforce a forfeiture on failure to pay premiums at the time they became due by the terms of its policies.

Buckbee vs. U. S. Ins. Co., 18 Barb. 541.
Same case, 1 Bigelow on Insurance, p. 406.
Ruse vs. Mut. Benefit Ins. Co., 26 Barb., 556.
Same case, 1 Bigelow on Insurance, p. 467.
Helme vs. Phila. Ins. Co., 61 Penn., 107.
Same case, 1 Bigelow on Insurance, p. 685.
Thompson vs. St. Louis Mut. Life Ins. Co , 52 Mo. 469.
Froehlich vs. Atlas Ins. Co., 47 Mo., 406.
Mayers vs. Ins. Co., 38 Iowa, 304.
Insurance Co. vs. Pierce, 75 Ill. 426.

In Thompson vs. St. Louis Mut. Life Ins. Co. there was a provision in the policy that, "If a premium is re- "ceived by the company after the day named in the "policy for its payment, it is considered by the company "and the assured as an act of grace or courtesy, and "forms no precedent in regard to future payments;" and yet it was held that the company had waived a literal compliance with the condition as to punctual payment, by reason of having received premiums for previous years, after they were due; and the company having been tendered the premium after it was due, the policy was held to be still in force.

In Ruse vs. Mut. Benefit Life Ins. Co., an agent of the company had given to the party insured a prospectus, declaring that a party failing to pay his premium for thirty days after they became due, the policy would cease;

and it was held that the company was thereby precluded from declaring a forfeiture by reason of the non-payment of the premium at the time stipulated in the policy.

In Helme vs. Phila. Ins. Co. it was said by the Court that such a pretence of liberality, if followed by entire strictness in practice, would be a fraud upon the rights of the party, which ought to be condemned and redressed.

In Mayers vs. Ins. Co. and in Ins. Co. vs. Pierce, it was held in each case that the company, by reason of previous indulgence granted in the payment of premiums, was bound to receive the premium even *after the insured was dead*, and thus make the policy effective in favor of the beneficiary.

And that is the necessary result of the doctrine of the cases we have cited. If an insurance company, instead of insisting upon the prompt payment of the premiums on its policies, as it has a right to do, receives premiums after they are due, without any requirement as to health or otherwise, and warrants the party in the belief that he may rely upon a similar indulgence in the future; then it ought to be considered as having given an extension of time for the payment of premiums, unless the insured receives notice from the company within a reasonable time before a subsequent premium becomes due, that a strict compliance with the terms of the policy, as to the time of the payments, will thereafter be enforced. If the party insured, within the limits of the time in which he has a right to rely upon the indulgence of the company, and prior to the time of the payment of his premium, becomes dangerously ill or even dies, that affords a still greater reason why the company should, upon a tender of the premium by the insured or the beneficiary, be held bound to accept it, and to recognize the policy as still in force.

The only object which a party has in procuring an insurance on his life, is to provide for the contingency of

mortal sickness or sudden death. That is equally understood by both the insurer and the insured as being the sole consideration, moving to the insured, for a policy on his life. If, in the case we have supposed, a refusal by a company to receive a premium from a party, though in perfect health, would be a fraud upon his rights, "which ought to be condemned and redressed," still greater would be the fraud perpetrated in allowing the company to repudiate its liability under a policy, simply because the contingency had arisen, which could alone ever make the insurance of any value to the beneficiary named in the policy.

Under the circumstances of this case we contend, if the defendant had refused to receive the premium at the time it was paid, on the morning of November 11th, 1872, and that the premium had then, or even after Mr. Garber's death, and within the period of 30 days from November 1st, been tendered to the company, that the plaintiff would unquestionably have been entitled, under the decisions to which we have referred, to have recovered on the policy sued on.

V.

If any error is to be found in the instructions of the Court, it is favorable to the plaintiff in error, and of which it can, of course, make no complaint. The Court charged the jury that if there had been no waiver of prompt payment on the part of the company, "then that the pay-"ment on the 11th of November would not be effectual "to renew the policy, if Garber was then dangerously "ill with yellow fever, and this fact was not disclosed to "the company's agents to whom the premium was "offered."

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touching the terms of a contract of insurance, and a friend paid the premium, but concealed from the agents the condition of the applicant, who was then *in extremis* and died in a few hours, that no valid contract arose from the transaction. But the Court carefully distinguishes the case from one where an effectual contract had already been made; and it is to be inferred from the language used (p. 382) that a different conclusion would have been arrived at, if the premium had been paid under similar circumstances, after it was due, in renewal of an existing contract.

Froehlich vs. Atlas Life Ins. Co., 47 Mo., 406, was where the policy was not to take effect until the first premium was actually paid. A note given for a part of the premium which fell due on August 15 was not paid until the 19th, the insured having either died or being mortally sick at the time of the payment, of which fact it is evident the company had no notice, and a recovery by the plaintiff was sustained by the Court.

In Baldwin vs. Chouteau Ins. Co., 56 Mo., 151, it was decided, that where an application for fire insurance had been made and accepted, the Company was bound, though the premium was afterward paid and received by the Company in ignorance of the fact that the premises had been destroyed by fire before the premium was paid. It was held that the payment of the premium completed and ratified the contract as of the date of the application and that the applicant was not bound to voluntarily inform the Company of the fire.

In the nature of the contract there would seeem to be no good reason why a beneficiary of a policy, in paying an over-due renewal premium, should be under any obligation, unless requested to do so, to inform the Company as to the condition of health of the party insured. It must be contemplated by an insurance company that every life it assures will at some period be visited by disease

and death. If it chooses, it can assure people in any condition, whether in full health or afflicted with a dangerous disease. It may require an examination of the applicant, a statement as to his age, health, habits and antecedents; or may issue him a policy without any requirements of that or a similar nature. The Company is the sole judge of the nature of the risk and the consideration to be received for insuring it. On the other hand, it is the privilege of a party who applies for an assurance on his life to remain passive and silent while the assurer passes upon his application and the value of his risk, unless some statement or representation is required of him. If the Company makes the fact of the applicant being in good health a condition of granting the assurance, then of course he would be bound to make known any material change in his condition as to health occurring between the time of the ascertainment by the Company of the value of the risk and the time of the consummation of the contract, as was decided in Piedmont Ins. Co. vs. Ewing (supra).

He is bound to make it known in that case, because the contract is presumedly, if not declaredly, made upon the same character of a risk which has been submitted to and considered by the insurer. But when a contract of insurance is once effected, the insurer has no right to presume that the subject insured will be in a condition of good health at any future time—on the contrary, he knows that at the end of each year the party insured, if still alive, will be at least that much nearer to some destined future illness which will result in his death. In any view that can be taken, the nature of the risk must be greater at any time during the continuance of the policy than it was when the contract was effected. So it cannot be said that the insurer has a right to suppose, when any renewal premium is paid on a life policy, that the subject of the risk remains the same as it did at the time of the

making of the contract. If the policy has become forfeited by the failure to pay one of the renewal premiums, the insurer can either cancel the policy or receive the over-due premium upon such terms as he may designate. But if he sees fit to receive it and continue the policy in force without any inquiry as to the party's health, we fail to see wherein it is incumbent upon the insured to make known his condition as to health, even though he may be desperately sick at the time. It would seem no more unconscionable for a sick person to desire to pay his premium after it becomes due, so as to secure the fruits of his previous investments, than for the insurer to receive an after due premium, knowing the party to be in good health. Both conditions are equally incidental to the risk originally assumed. Regarded as a matter of investment, the parties' interests are continually in conflict. The insurer receives the premiums with the hope that the largest expectancy of the life insured will be realized; on the other hand, the insured pays them solely in consideration of the uncertain tenure of his health and life. It may be said that during the interim, between the time the premium becomes due and the time of its payment, the insured has the right to abandon his insurance; and that it is inequitable, when overtaken with disease, for him to pay the premium without acquainting the insurer with his condition. But to that it can be answered that the insurer, by receiving the premium, has recognized as a fact that the time of payment is not of the essence of the contract, and has simply reinstated the party insured to the same rights which he would have had under the original contract by an earlier payment of the same renewal premium.

The proposition last considered, though insisted upon by the plaintiff at the trials in the Circuit Court, does not arise here, as she was the prevailing party. We have referred to it in order to show that the law given by the

Court was favorable to the company, which has sued out the writ of error from this Court.

And we believe that a bare perusal of the facts of the case will make manifest the justice of the verdict and judgment in the Court below.

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Attorneys for Defendants in Error.